Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of AT&T Corp. to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	))))	RM No. 10593

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel") submits these comments in response to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on October 29, 2002 soliciting comments concerning the above-captioned Petition for Rulemaking ("Petition") filed by the AT&T Corp. on October 15, 2002.[1] Because most of CompTel's member companies purchase incumbent local exchange carrier ("ILEC") interstate special access services as a critical input to their own telecommunications services, CompTel has a strong interest in the outcome of this proceeding. Thus, CompTel files these comments in support of AT&T's Petition and urges the Commission to expeditiously grant this Petition.

In its Petition, AT&T establishes that the BOCs, the nation's dominant ILECs, have been able to consistently earn supracompetitive profits throughout the relevant time

[1] Public Notice, Federal Communications Commission, DA 02-2913, *Wireline Competition Bureau Seeks Comment On AT&T's Petition For Rulemaking To Reform Regulation of Incumbent Local Exchange Carrier Rates For Interstate Special Access Services,* RM No. 10593, released October 29, 2002.

period, under at least two different measures of cost.[2] AT&T further explains that these supracompetitive prices for a critical telecommunications service input have had enormous effects in terms of welfare loss on the development of competition in the downstream markets affected by the BOCs' monopoly control over the special access input market.[3] Specifically, AT&T describes how the BOCs have been able to thwart facilities-based competition in both upstream input markets and downstream retail markets as a result of this monopoly control over special access.[4] Finally, AT&T documents how market forces and existing regulations have proven insufficient to constrain and mitigate (and in some instances have helped to exacerbate) the anticompetitive effects of the BOCs' market power over interstate special access services.[5]

Thus, AT&T asks the Commission for the only relief that can effectively address the harms that it so thoroughly chronicles in its Petition and supporting documentation—that the Commission take immediate action to constrain the further abuse of the BOCs' market power. Specifically, AT&T asks that the Commission undertake a rulemaking proceeding to "reinitialize price caps to levels designed to produce normal, rather than monopoly, returns."[6] AT&T additionally asks the Commission to provide immediate relief to consumers of interstate special access services by reducing all special access prices to rates necessary to provide the originally-authorized price cap return of 11.25%,

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[2] AT&T documents that using either embedded historical costs, as reported in the Commission's ARMIS database, or forward looking costs, as calculated under the Commission's TELRIC standard, the BOCs' rates of return on interstate special access service have been exorbitant and trending upward, even as revenues in competitive segments of the telecommunications industry have been declining. *Petition* at pp.7-14.
[3] *Id.*, pp. 16-24.
[4] *Id.*
[5] *Id*. at pp. 25-33.
[6] *Id*. at 39.

and to impose a moratorium on the consideration of further requests for pricing flexibility throughout the duration of the rulemaking.[7]

CompTel concurs with, and supports, AT&T's Petition, its supporting materials, and its requested relief in their entirety. In these Comments, CompTel will provide some further support for AT&T's descriptions of how the BOCs' abuse of their existing market power over interstate special access services has allowed them to deter future entry and how market forces, under current Commission rules, have proven unable to constrain the BOCs' ability to impose costly and unreasonable burdens on consumers of telecommunications services for which special access is a critical input.

I. The BOCs Have Used Pricing Flexibility to Strategically Deter Competitive Entry

In its Petition, AT&T describes how the BOCs' high special access prices could limit deployment of competitive facilities by integrated telecommunications providers seeking to self-provision switching or transport by making uneconomic partial facilities-based entry predicated on the use of the Bell facilities as a "bridge" to more intensive facilities deployment.[8] This is because in order to enter the market at all, and acquire sufficient customers to justify a facilities build out, a carrier must be able to enter efficiently—which becomes exceedingly difficult given the enormous special access prices charged by the BOCs under the Commission's existing regulatory regime.

AT&T also notes that the BOCs can foreclose competitive entry through their

[7] *Petition* at 39.
[8] *Id*. pp. 16-18.

ability to price discriminate and their ability to deny competitive entrants access to customers through the use of anticompetitive pricing plans which limit the amount of sales a new entrant could secure.[9] The BOCs' ability to exclude new, facilities-based competitors from the special access market by foreclosing their access to critical customers is especially important for the Commission to understand in this proceeding. While AT&T provides information on how its ability to use competitive alternatives, to the degree they exist, is limited by its own optional pricing plans ("OPPs") with the BOCs, it is important to note that if most carriers are purchasing special access services subject to OPPs, then up to 75% of the addressable interstate special access market is being foreclosed from competitors by such contracts.[10] This is extremely significant because providing wholesale services to other carriers is the most efficient way for a competitive transport provider to get sales. It is comparatively easier to market to carriers both because they comprise the majority of the market and there are, generally, fewer carriers than end-user customers. Because of this customer foreclosure, it is not surprising that, as AT&T notes, many of the largest wholesale providers of special access alternatives are currently in bankruptcy.[11]

Similarly, as noted above, AT&T correctly observes that any notion that a "price umbrella" is created by the BOCs' high special access rates is likely to be regarded by

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[9] *Petition*, pp. 18-22.

[10] CompTel gets this number from the Commission's report of Telecommunications Industry Revenues 2000. The report was released in January, 2002, and covers the year 2000. The report notes that the total end-user interstate special access revenues for the RBOCs were about $2.3B. Table 6, line 406. The report also notes that carrier purchases of interstate special access totaled $6.9 B. Table 5, line 305. Thus, the total interstate special access market for 2000 was $9.2 B, of which carriers comprised 75% (6.9/9.2).

[11] *Petition* at 27. CompTel would note that, in addition to the carriers mentioned by AT&T, there are many more wholesale access providers that are also in bankruptcy, including Metromedia Fiber, NEON Communications, and XO Communications.

competitors as illusory, and the BOCs' ability to price discriminate by ignoring sunk costs in their post-competitive entry pricing decisions will likely to be perceived by prospective entrants as a barrier to entry. It should, however, be further noted that there is, in the Triennial Review record, evidence that the BOCs may already be strategically pricing special access services so as to discourage competitive entry.

On October 29, 2002, WorldCom introduced an analysis of how BOC special access prices are structured, and explained that the BOCs have established pricing structures that place the bulk of their supracompetitive profits in the distance-sensitive component of their special access prices.[12] WorldCom explains that, for each special access circuit, there is a fixed "facilities" charge and a distance-sensitive mileage component. In comparing special access vs. UNE prices, WorldCom observes "[i]t is noteworthy that, for DS3s, the fixed special access charge is, on average, lower than the fixed UNE charge."[13] This point is indeed "noteworthy" because low-mileage, dense urban routes are precisely those where one would expect that competitive facilities-based entry would occur. On such routes, competitors could enter the market on a relatively limited basis (in terms of fixed and sunk investment) and attempt to gain a "toe-hold" with which to expand their facilities.

Thus, it is not at all surprising that, on such routes, the BOCs would choose to price below a rate that, at least publicly, they claim is "below cost." As Professors Willig and Ordover explain, "[t]here is now a substantial economics literature demonstrating that an incumbent may want to use "predatory" actions (for example price below some

[12] Letter of Henry G. Hultquist, WorldCom, to Marlene H. Dortch, FCC, dated October 29, 2002, CC Docket Nos. 96-98, 98-147, 01-338, pp. 6-8.
[13] *Id.* at 7.

pertinent measure of cost) to establish a reputation for 'toughness' and thereby dissuade subsequent potential entrants from invading its turf."[14]

II. Market Forces Have Not, And Will Not, Constrain the BOCs' Market Power Over Interstate Special Access Services

AT&T provides substantial and thorough documentation of how the BOCs' abuse of their market power in the interstate special access market has gone unconstrained, despite some limited competitive entry.[15] Because entry is, necessarily, going to occur on a limited and incremental basis, the BOCs will only be subject to competitive price discipline when the *cumulative* effects of numerous competitive entrants provides the level of alternative capacity to make the threat of leaving the ILEC network a credible threat. While this level of wholesale market competition is a desirable goal, there are, as AT&T notes, substantial legal and economic barriers to entry that will not allow for a workably competitive wholesale market in the foreseeable future.

While we have already identified the BOCs' strategic pricing as one barrier to entry, another barrier to widespread competitive entry is the high proportion of sunk costs associated with the deployment of competitive facilities.[16] Similarly, it is well established, both within this docket and outside of this docket, that in considering the expense of undertaking the new construction of competitive fiber facilities (both

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[14] Declaration of Janusz A. Ordover and Robert D. Willig in support of AT&T's Petition, ¶ 58 (internal citations omitted).
[15] *Petition*, pp. 25-31.
[16] *See, e.g.*, Larson, *An Economic Guide to Competitive Standards in Telecommunications Regulation*, 1 CommLaw Conspectus 31, 52 ("if entry requires the incurrence of capital costs, and a 'high' proportion of these are sunk costs for entrants, then entry barriers exist.") *c.f.*, Bolton, Brodley, and Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Geo. L.J. 2239, 2265 (August, 2000)("if challenged by new entry, the incumbent will rationally disregard such [sunk] costs in its pricing decisions rather than lose the business. The entrant . . . must now incur such costs, and therefore faces risk of underpricing by an incumbent with sunk costs. Thus, as a result, sunk costs may act as an entry barrier, giving the incumbent the ability to raise price above the competitive level.")

backbone and last mile), the competitive carrier will confront costs not borne by the incumbent carrier. For example, the ILEC likely secured its initial access to both rights-of-way[17] and commercial buildings[18] on more favorable terms than subsequent entrants can expect to obtain. All of these factors contribute to substantial entry barriers which allow the BOCs to use their monopoly position in the interstate special access market to impose welfare losses on consumers and competitors. Similarly, all of these factors suggest that the relief sought by AT&T is the only relief that will be immediate and substantial enough to restore competitive integrity to those downstream telecommunications markets which use interstate special access service as a substantial input.

III. The Public Interest Will Be Served By the Immediate Grant of the Relief Requested In the AT&T Petition

It is significant that the inability of competitive telecommunications carriers to obtain any efficiently priced alternatives to ILEC special access services has caused consumers to suffer the most by limiting the number of small business consumers that can economically take advantage of the enormous benefits of advanced services incorporating the latest telecommunications technologies. For many businesses, the DS1 loop is how they receive broadband service. This broadband service combined with the

[17] *See generally*, Day, *The Concrete Barrier at the End of the Information Superhighway: Why Lack of Local Rights-of-Way Access Is Killing Competitive Local Exchange Carriers*, 54 Fed. Comm. L.J. 461 (May 2002). c.f., *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2d Cir. 2002)(municipal ordinances imposing costs on entrants not borne by incumbents is a barrier to entry and subject to preemption under Section 253 of the Act). Such litigation can take years; indeed, CompTel member City Signal Communications has had a petition for preemption pending with the Commission on this very issue for over 2 years. *Petition for Declaratory Ruling, City Signal Communications, Inc. v. City of Cleveland Heights*, CS Docket No. 00-253, filed October 18, 2000.

[18] See letter from Ruth Milkman, on behalf of WorldCom, to Marlene H. Dortch, FCC, CC Docket Nos. 96-98, 98-147, 01-338, dated October 25, 2002 (describing discriminatory terms vis-à-vis incumbents which competitors confront when trying to deploy high capacity facilities to commercial buildings).

innovative packet-based network services of competitive carriers allows consumers who would have never considered broadband service before to qualify for the benefits of advanced services. One reason for this is that new, IP-based PBX systems allow consumers to dynamically allocate their bandwidth consumption between data and voice ensuring that bandwidth, even for smaller businesses, is efficiently used. Additionally, packet-based PBX services can allow customers the ability to further customize their own vertical features to create services and capabilities not offered by the BOCs. However, the penetration of these advanced, productivity-enhancing services to small business customers has, no doubt, been dramatically arrested by the BOCs' continued and egregious abuse of their market power over the most critical telecommunications input—special access.

Conclusion

For the aforementioned reasons, CompTel believes that it is imperative that the Commission act expeditiously to grant the Petition of AT&T in its entirety.

Respectfully submitted,

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